Supreme Court, U.S.
FILED
AUG 17 1983
ALEXANDER L. STEVAS, CLERK

No. 83-94

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

S.S. NANCY LYKES, her engines, boilers, etc. and LYKES BROS. STEAMSHIP COMPANY, INC.,

Petitioners,

—against—

GENERAL ELECTRIC COMPANY INTERNATIONAL SALES DIVISION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JOHN E. CONE, JR.
Counsel for Respondent
14 Wall Street
New York, New York 10005
(212) 732-4646

BIGHAM ENGLAR JONES & HOUSTON
HELEN M. BENZIE
LAWRENCE B. BRENNAN
Of Counsel

August 15, 1983

Counter-Statement of Questions Presented for Review

1. Is the finding that the petitioner, in light of all the circumstances, engaged in a pre-planned unreasonable deviation by diverting its vessel to San Pedro solely for its own pecuniary gain, a finding which is subject to the review of this Court?

2. Is the petitioner deprived of its contractual, bill of lading, liability limitations because of its unreasonable deviation?

TABLE OF CONTENTS

PAGE

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW i

COUNTER-STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

POINT I—The Second Circuit's concurrence with the Trial Court factual finding that Lykes unreasonably deviated is amply supported by the record 6

POINT II—The Second Circuit correctly determined that the COGSA package limitation was inapplicable since Lykes had engaged in an unreasonable deviation 7

CONCLUSION 11

APPENDIX 1a

Excerpts from Deposition of Sidney Rivers 1a
Excerpts from Deposition of John Scally 2a
Excerpts from Testimony of Dale Werner 4a
Excerpts from Testimony of Robert A. Raguso 6a
Excerpts from Testimony of Richard Oakes Patterson 16a
Excerpts from Testimony of Ralph Lacher 18a
Excerpts from Testimony of William Kaciak 27a

TABLE OF AUTHORITIES

Cases:

Atlantic Mutual Ins. Co. v. *Poseidon Schiffahart, G.m.b.H.*, 313 F.2d 872 (7th Cir.), *cert. denied*, 375 U.S. 819 (1963) 5, 8

DuPont de Nemours Int'l. S.A. v. *S.S. Mormacvega*, 493 F.2d 97 (2d Cir. 1974) 8, 9

Encyclopaedia Britannica, Inc. v. *S.S. Hong Kong Producer*, 422 F.2d 7 (2d Cir. 1969), *cert. denied*, 397 U.S. 964 (1970) 5, 9

General Motors Corp. v. *S.S. Mormacoak*, 327 F. Supp. 666 (S.D.N.Y.), *aff'd*, 457 F.2d 24 (2d Cir. 1971) .. 7

Hellenic Lines, Ltd. v. *United States*, 512 F.2d 1196 (2d Cir. 1975) 9

Jones v. *The Flying Clipper*, 116 F. Supp. 386 (S.D.N.Y. 1953) 8, 9

Miller Yacht Sales, Inc. v. *M/V Vishva Shobha*, 494 F. Supp. 1005 (S.D.N.Y. 1980) 7

Mitsui & Co., Ltd. v. *American Export Lines*, 636 F.2d 807 (2d Cir. 1981) 10

Nemeth v. *General Steamship Corp.*, 694 F.2d 609 (9th Cir. 1982) 8, 9, 10

Niles-Bement-Pond Co. v. *Dampkiesaktieselskabet Balto*, 282 F. 235 (2d Cir. 1922) 8

The Pelotas, 66 F.2d 75 (5th Cir. 1933) 8

The Sarnia, 278 Fed. 459 (2d Cir. 1921), *cert. denied*, 258 U.S. 625 (1922) 7

St. John's Corp. v. *Companhia Geral Commercial do Rio De Janeiro*, 263 U.S. 119 (1923) 7

Searoad Shipping Co. v. *E. I. duPont de Nemours and Company*, 361 F.2d 833 (5th Cir. 1966) *cert. denied*, 385 U.S. 973 (1966) 5

Spartus Corp. v. *The S/S Yafo*, 590 F.2d 1310 (5th Cir. 1979) 8, 9

United States v. *Johnston*, 268 U.S. 220 (1925) 6

United States Shipping Board E.F. Corp. v. *Rosenberg Bros. & Co.*, 12 F.2d 721 (9th Cir. 1926), *reversed on other grounds*, 276 U.S. 202 (1928) 7, 8

The Waalhaven, 36 F.2d 706 (2d Cir. 1929), *cert. denied*, 281 U.S. 747 (1930) 5, 7

The Willdomino, 300 F. 5 (3rd Cir. 1924), *aff'd, sub nom. The Willdomino* v. *Citro Chemical Co.*, 272 U.S. 718 (1927) 7

W.R. Grace & Co. v. *Toyo Kisen Kabushiki Kaisha*, 7 F.2d 889 (N.D. Cal. 1925), *aff'd* 12 F.2d 519 (9th Cir.), *cert. denied*, 273 U.S. 717 (1926) 5

Statutes:

United States Carriage of Goods by Sea Act, 46 U.S.C. 1300, *et seq.*:

Section 1301(c) 7
Section 1303(8) 9
Section 1304(4) 8, 9
Section 1304(5) 8, 9, 10
Section 1305 9

46 U.S.C. §§ 181, 183-189, 190-194 7

Other Authority

Knauth. *Ocean Bills of Lading*, 241 (4th ed. 1953) ... 8

RESPONDENT'S BRIEF IN OPPOSITION

Counter-Statement of the Case

General Electric Company International Sales Division[1] (hereinafter G. E.) submits its Counter-Statement of the Case solely to correct the inaccuracies and omissions in the Statement of the Case in the Petition of Lykes Bros. Steamship Company, Inc. (hereinafter Lykes). It should be noted that G. E. considers the true facts of this case adequately set forth in the opinions of Judge Lasker and the Second Circuit Court of Appeals (P. App., A1-B12).* We shall deal with the inaccuracies and misstatements set forth in Lykes' Petition in their sequential order of appearance, rather than dealing with the most or least important first.

At page 3 of its Petition, Lykes states that all of the bills of lading, including those for previous shipments aboard Lykes' vessels, had been prepared by an agent of General Electric. In support, Lykes cites P. App. E18. Not only does this page of Lykes' Appendix fail to support its contention, but also, the record is totally devoid of any such evidence. In fact, Lykes never produced any of its bills of lading for prior G. E. locomotive shipments it carried. Unfortunately, as repeatedly done by Lykes throughout its Appendices, P. App. E18 is taken totally out

[1]General Electric Company is a publicly held corporation incorporated in the State of New York with its office of record at 1 River Road, Schnectady, New York, its headquarters in Fairfield County, Connecticut, and the offices of its International Trading Operations at 570 Lexington Avenue, New York, New York. The support services and support of export sales previously performed by the International Sales Division, which has been dissolved since this lawsuit began, are currently performed by the Company's International Trading Operations. These entities were and are wholly owned by the Company.

Canadian General Electric Company Limited, General Electric de Mexico—S.A. de C.V. and SADELMI-COGEPI, Compagnia Generale Progettazioni e Installazioni S.p.A. are affiliates of General Electric Company.

*All references to "P. App." are to the Appendices of Lykes' Petition with appropriate references to the pages of Appendices A, B, C, D and E.

of context from the actual trial and appellate record. A review of the complete and relevant testimony indicates that the witness, cited by Lykes, had limited his testimony solely to the particular shipment in question (R. App. 2a-4a).** Equally misleading is the statement in the first paragraph of page 4 of Lykes' Petition which implies that the cargo underwriter for G. E. paid the entire claim and covered the entire risk. Indeed, the record below clearly demonstrates that G. E. was paid only $1,075,000 by its underwriter, and that the full replacement value of the locomotive cabs, together with the additional ocean freight for transporting the replacements was $1,709,000. Thus, G. E. had a substantial uninsured interest of $634,000 which was part of the judgment (P. App. C1-C2, E7, R. App. 4a-6a).

On pages 4 and 5 of its Petition, Lykes, once again, continues to claim that the route actually taken by the NANCY LYKES was customary and that the actual route was a recognized great circle route presumably used by other liner services between the Panama Canal and Kobe, Japan. In fact, despite these assertions, Lykes utterly failed to offer any testimony that there was any such customary route. Even its own weather expert, who was retained only after the vessel arrived at San Pedro and after weather conditions had begun to severely deteriorate off the California coast, admitted during cross-examination, that the customary routes from Panama to Kobe were considerably south of the route actually taken (R. App. 28a-30a). Despite this, Lykes still claims, as it did without success to the Second Circuit, that the pilot chart in evidence contains a great circle route between the Panama Canal and Kobe, Japan. Reference to the pilot chart cited by Lykes (P. App. E25), clearly shows that there is no such route. Lykes is apparently linking two separate and distinct routes together, one route from the Panama Canal to Los Angeles to a second route from San Francisco to Yokohama, Japan, and inferring that the linked routes are one, continuous recommended route from the Canal to Kobe.

**All references to "R. App." are to the Respondent's Appendix.

In fact, the only routes specified from Los Angeles (San Pedro) to the Far East on the pilot chart (P. App. E25), are routes through Honolulu and to the Surigao Strait and the San Bernardino Strait.

At the time of the casualty, the NANCY LYKES was approximately 600 miles north of the northernmost customary route calculated on a straight north-south line between the site of the casualty and the border of the northernmost customary route. At the same time, the ship was approximately 1020 miles north of the pilot chart route and 1320 miles north of the southernmost envelope boundary (P. App. A10, A25, R. App. 13a).

Despite Lykes' assertions, every mariner with experience of spring weather conditions off the California coast, including the NANCY LYKES chief mate for this voyage, acknowledged that gale and near gale northerly winds were a well-known problem (P. App. B9, R. App. 1a, 8a-9a). If Lykes had used any of the admitted customary and usual envelope routes, it was uncontroverted that the locomotives would have arrived safely at their destination (P. App. B2, B8-B9, R. App. 7a, 13a-15a, 16a-17a). Lykes admitted that the sole reason for the deviation was its own pecuniary gain, without regard to the safety of the cargo (P. App. B9, R. App. 20a-26a). In fact, the NANCY LYKES, which was considerably behind its published schedule before the deviation, lost an additional three days and 14 hours by going to San Pedro (R. App. 18a).

At page 4 of its Petition, Lykes implies a prior usage of San Pedro as a bunkering port for its vessels and indicates that it had been using that Port since 1937. In fact, Lykes never had any vessel stop for bunkers at any port, other than a regularly scheduled cargo port-of-call, before January 1978 (R. App. 22a-24a, 26a). Only two of Lykes' ships outbound, from the United States Gulf Coast to the Far East, had ever stopped at San Pedro before this voyage (R. App. 18a-20a).

Lykes places great emphasis in its Petition, at pages 5 and 6, on the fact that the pilot chart (P. App. A25) indicates that the frequency of gales south of 35°N is not more than 4% during the month of April. This new reliance by Lykes is misplaced since the pilot chart completely fails to delineate, by longitude, the areas of the vast Pacific involved. Furthermore, the pilot chart, on its face, states:

> "Founded upon the researches made in the early part of the nineteenth century by Matthew Fontaine Maury, while serving as a Lieutenant in the United States Navy."

Obviously, aside from its lack of detail, the weather information in the pilot chart may be out-dated. Further, the pilot chart suggests that more detailed information of the conditions for U.S. coasts be obtained from the "Coast Pilot" which is prepared by the National Ocean Survey and the "Mariners Weather Log" prepared by the National Oceanic and Atmospheric Administration (NOAA) which was in evidence. This undoubtedly is one reason why both sides retained their own weather experts to testify at trial.

G. E.'s weather expert, in using data compiled for the last 22 years, for the specific area of the ocean where the loss took place, testified, with supporting documentation, that the percentage possibility or probability of encountering gale winds was 5-6% (R. App. 8a, 15a-16a). Lykes' weather expert, on the other hand, was vague in his testimony concerning the probability of adverse weather off the California coast and completely failed to define, by longitude, the area he was discussing (R. App. 27a-28a).

Equally misplaced is Lykes contention, at page 6 of its Petition, that it was not forewarned of the possibility of adverse weather by the prior visits of the BRINTON LYKES and DOLLY TURMAN to San Pedro. The record is quite clear that the DOLLY TURMAN encountered Gulf of Tehuantepec winds as a direct result of her deviation to San Pedro (R. App.

6a, 9a-13a). Insofar as the BRINTON LYKES is concerned, it is most probable that that vessel was on a far more northerly route than what would have been customary because of its diversion to San Pedro. At any rate, Lykes failed to produce any evidence of what that vessel's route would have been but for its diversion.

Reasons for Denying the Writ

This Court has repeatedly denied certiorari in similar matters involving the same issues. *Encyclopaedia Britannica, Inc.* v. *S.S. Hong Kong Producer*, 422 F.2d 7 (2d Cir. 1969), *cert. denied*, 397 U.S. 964 (1970); *Searoad Shipping Co.* v. *E.I. duPont De Nemours & Co.*, 361 F.2d 833 (5th Cir.), *cert. denied*, 385 U.S. 973 (1966); *Atlantic Mutual Ins. Co.* v. *Poseidon Schiffahart, G.m.b.H.*, 313 F.2d 872 (7th Cir.), *cert. denied*, 375 U.S. 819 (1963); *The Waalhaven*, 36 F.2d 706 (2d Cir. 1929), *cert. denied*, 281 U.S. 747 (1930); *W. R. Grace & Co.* v. *Toyo Kisen Kabushiki Kaisha*, 7 F.2d 889 (N.D. Cal. 1925), *aff'd*, 12 F.2d 519 (9th Cir.), *cert. denied*, 273 U.S. 717 (1926). In *Atlantic Mutual, supra*, the Seventh Circuit noted that the unreasonable deviation ousted the contract and deprived the carrier of the bill of lading limitations leaving only the statutory, Carriage of Goods by Sea Act (hereinafter COGSA), 46 U.S.C. §1300 *et seq.*, limitations. There is no conflict between the instant case and *Atlantic Mutual, supra*, because here the statute, COGSA, did not apply as a matter of law but only as a contractual provision which, the Seventh Circuit would agree, was ousted by the unreasonable deviation. No new issues or industry-wide considerations exist to warrant this Court's exercise of its jurisdiction. Therefore, certiorari should be denied.

POINT I

The Second Circuit's concurrence with the Trial Court's factual finding that Lykes unreasonably deviated is amply supported by the record.

The finding that the deviation was unreasonable, as stated here by the Second Circuit (P. App. A12-A14) was clearly a finding of fact and as such does not belong before this Court. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

This factual finding was overwhelmingly supported by the record which clearly showed:

a. Lykes sole purpose in sending the NANCY LYKES to San Pedro was its own financial gain (P. App. B5-B6, B9, R. App. 20a-26a);

b. Lykes never advertised San Pedro as one of its ports-of-call for this voyage of the NANCY LYKES (P. App. B5, B11-B12, R. App. 22a);

c. Lykes' operations department planned the deviation before the voyage began and totally failed to consider the impact of such a deviation on the safety of the crew, vessel and cargo (P. App. B9, R. App. 20a-22a);

d. The deviation was made despite Lykes knowledge of potentially adverse weather and ocean current conditions (P. App. B9, R. App. 25a);

e. The deviation placed the vessel 600 to 1320 miles north of where it should have been and delayed its already very late expected arrival in Japan by an additional 3 days, 14 hours (P. App. A10, R. App. 16a-18a), and

f. Lykes failed to retain a weather routing service until the vessel had already arrived at San Pedro and weather conditions outside the Port had begun to deteriorate (R. App. 28a-30a).

As the Second Circuit here stated:

> ". . . [A] deviation is unreasonable thereby breaching the contract of carriage, when, in the absence of significant countervailing factors, the deviation substantially increases the exposure of cargo to foreseeable dangers that would have been avoided had no deviation occurred." (P. App. A-14).

POINT II

The Second Circuit correctly determined that the COGSA package limitation was inapplicable since Lykes had engaged in an unreasonable deviation.

Since the locomotives were carried on the deck of the NANCY LYKES, COGSA did not apply by and of its own statutory force, but only as a contractual bill of lading provision, 46 U.S.C. §1301(c); *General Motors Corp.* v. *S.S. Mormacoak*, 327 F. Supp. 666, 667 (S.D.N.Y.), *aff'd*, 451 F.2d 24 (2d Cir. 1971); *Miller Yacht Sales, Inc.* v. *M/V Vishva Shobha*, 494 F. Supp. 1005, 1014 (S.D.N.Y. 1980). *See also*, P. App. A15, footnote 7.

It was manifestly clear that before the enactment of COGSA, the entire contract of carriage was ousted when an ocean carrier engaged in an unreasonable deviation. *The Waalhaven, supra; The Willdomino*, 300 F. 5 (3rd Cir. 1924), *aff'd, sub nom. The Willdomino* v. *Citro Chemical Co.*, 272 U.S. 718 (1927); *St. John's Corp.* v. *Companhia Geral Commercial do Rio De Janeiro*, 263 U.S. 119, 124 (1923); *The Sarnia*, 278 Fed. 459, 463 (2d Cir. 1921), *cert. denied*, 258 U.S. 625 (1922).

Prior to COGSA, the Harter Act and Limitation of Liability Act provisions that might be for the carrier's benefit were also ousted by an unreasonable deviation. 46 U.S.C. §§ 181, 183-189, 190-194; *United States Shipping Board E.F. Corp.* v. *Rosenberg*

Bros. & Co., 12 F.2d 721, 723 (9th Cir. 1926), *reversed on other grounds*, 276 U.S. 202 (1928); *The Pelotas*, 66 F.2d 75, 77 (5th Cir. 1933); *Niles-Bement-Pond Co.* v. *Dampkiesaktieselskabet Balto*, 282 F. 235, 237 (2d Cir. 1922).

Since the Seventh Circuit in *Atlantic Mutual Ins. Co., supra*, agrees that an unreasonable deviation voided the ocean carrier's bill of lading, there is no need to discuss the "in any event" language contained in COGSA, Section 1304(5).

COGSA Section 1304(4) merely state that there are both reasonable and unreasonable deviations, with two types of deviations to be considered as *prima facie* unreasonable. Obviously, the framers of COGSA had no intent of changing the well-known, pre-existing law concerning reasonable and unreasonable deviations otherwise they surely would not have mentioned both types of deviations. The vast majority of decisions concerning the COGSA effect of unreasonable deviations have stated that there was no intent by Congress to effect a change in the pre-existing common law rule by abolishing the penalty an ocean carrier would have to pay for an unreasonable deviation. *Nemeth* v. *General Steamship Corp.*, 694 F.2d 609 (9th Cir. 1982); *Spartus Corp.* v. *The S/S Yafo*, 590 F.2d 1310 (5th Cir. 1979); *DuPont de Nemours Int'l. S.A.* v. *S.S. Mormacvega*, 493 F.2d 97, 100 (2d Cir. 1974); *Jones* v. *The Flying Clipper*, 116 F. Supp. 386, 389-390 (S.D.N.Y. 1953).[2]

The courts have set forth a number of reasons for imposing full liability, notwithstanding any package limitation, on an ocean carrier which unreasonably deviates. These reasons are as follows:

---

[2]"Neither the Convention nor any Act passed under the Convention contains any provision concerning the legal result of a deviation. Nor is there any other statute on the subject. Consequently the general case law continues to furnish the rule." Knauth, *Ocean Bills of Lading*, 241 (4th ed. 1953).

a. If the limitation were to be left intact, then an unjustified deviation would be no different than any ordinary breach of the carrier's obligations;

b. Mere negligence of the carrier in the performance of its statutory duties was never the same as deviation;

c. The carrier's voluntary, unreasonable deviation has the effect of changing the very essence of the contract of carriage;

d. Permitting the survival of the package limitation where an unreasonable deviation has taken place would be tantamount to licensing an ocean carrier to recklessly violate the terms of a bill of lading, not to mention the safety factor involved, while only being liable for the small limitation amount;

e. An unreasonable deviation exposes the cargo to risks that neither the shipper nor its underwriter anticipate; and

f. There is nothing in COGSA to indicate that shippers should anticipate an unreasonable deviation.

Nemeth, supra, 612-613; *Spartus Corp., supra,* 1316-1317, *S.S. Mormacvega, supra; The Flying Clipper, supra. See also, Hellenic Lines, Ltd.* v. *United States,* 512 F.2d 1196 (2d Cir. 1975); *Encyclopaedia Britannica, supra.*

In addition, it should be noted that Sections 1304(5) and 1305 of COGSA permit a carrier to increase its potential liabilities, but Section 1303(8) strictly prohibits a carrier from diminishing its potential liabilities. Obviously, if a carrier had undertaken to increase its liabilities, the "in any event" language of COGSA Section 1304(5), standing on its own, could not be literally interpreted. Lykes chose to unreasonably deviate and, in doing so, chose under COGSA Sections 1304(5) and 1305 to increase its liabilities and responsibilities. A literal interpretation of the "in any event" clause of COGSA Section

1304(5) not only fails to take into consideration other language in COGSA but also is totally unrealistic in light of the effect such an interpretation would have.

Once again, Lykes is contending that, since cargo has its own insurance protecting it against deviation, there is no need for imposing full liability on the ocean carrier. This argument, like the literal interpretation of "in any event" in COGSA Section 1304(5), makes no practical sense. What Lykes fails to mention is that the vast majority of ocean carriers also have their own deviation insurance and that since the ocean carrier, not cargo, made the choice to unreasonably deviate, the ocean carrier or its underwriter should pay. Furthermore, not all cargo is insured and not all cargo is fully insured, as in this case. *See, Nemeth, supra.* Yet, there should only be one rule of law and that rule should be one that consistently places the penalty on the wrongdoer rather than on the innocent party. As was aptly stated by the Second Circuit in *Mitsui & Co., Ltd.* v. *American Export Lines,* 636 F.2d 807, 815 (2d Cir. 1981):

> "That [legislative] history leaves no room for doubt that the two dominant objectives of Congress were to ensure uniformity in the basic rights and responsibilities arising out of bills of lading and—most important for our present inquiry—to fix 'an irreducible minimum of immunity of the carrier from liability'. H.R.Rep. No. 2218, 74th Cong., 2d Sess., 1 (1936). This latter objective underlies both the carrier's duties to furnish a seaworthy ship and to care properly for the cargo, 46 U.S.C. §§ 1303(1) and 1303(2), and the minimum level of liability established by § 4(5). To fulfill Congress' ultimate objective, both aspects of the statute must be given effect; *the carrier's duties would be meaningless if their violation entailed no significant liability.* In interpreting § 4(5), courts must therefore take a critical look at any proposed construction of that section that would reduce a carrier's liability below reasonable limits. A similar conclusion is dictated under Lord Diplock's thesis

that the carrier must be subject to 'a liability for loss or damage to the goods sufficient to provide him with a commercial inducement to undertake precautions [in addition to those required for protection of the vessel], the cost of which would be economically justified by the risk of loss or damage to the goods.' Conventions and Morals—Limitation Clauses in International Maritime Conventions, 1 Journal of Maritime Law & Commerce (hereinafter JML&C) 525, 527 (1970)." (emphasis added).

CONCLUSION

The questions presented were correctly decided and interpreted by the courts below and the writ should be denied in all respects.

Dated: August 15, 1983

Respectfully submitted,

JOHN E. CONE, JR.
14 Wall Street
New York, New York 10005
(212) 732-4646
Attorney for Respondent

BIGHAM ENGLAR JONES & HOUSTON
HELEN M. BENZIE
LAWRENCE B. BRENNAN
Of Counsel

Excerpts from Deposition of Sidney Rivers

(57)[1]Q. You would recall, I would assume, any hove to, A. The ship was under very slow speed at the time.

Q. Had it come to a stop? A. No, it had not come to a stop, we were just making headway, but we did not come to a stop.

Q. Had you ever had occasion, prior to this, to be off the California Coast in May or last April? A. Many years back when I used to be sailing in the forecastle.

Q. And would that have been once or twice? In other words, what I really am asking is, do you have any experience at all prior to this with the weather conditions off the California Coast in April or May? A. Oh, yes.

Q. You have experience? A. Yes.

Q. During those times had you encountered weather conditions similar to this in April, or May off the California Coast? A. Yes.

Q. Isn't it fairly common to experience Santa Anna (58) winds off the California Coast during April and May? A. Around that time of the year.

Q. You would agree with that, wouldn't you? A. Yes.

Q. Is it also common to experience weather conditions similar to this off the Panama Coast in April or May? A. No.

Q. Concerning the storm that you encountered prior to leaving the Port of Los Angeles, or San Pedro, were you aware that any storm was going on out at sea at that time? A. Not to my knowledge, no.

Q. And after leaving safe harbor did you begin to notice that the weather conditions were becoming adverse? A. I think it was in the evening time, in the evening time, a day after sailing it started to get swells.

Q. Would that have been the same day you left port? A. Yes, the same day.

---

[1]Numerals in parenthesis refer to the original page numbers in the deposition on transcript being excerpted.

EXCERPTS FROM DEPOSITION OF JOHN SCALLY

Q. How bad was the swelling? A. Well, it was not too bad at that present time, * * *

* * * * *

(14) * * *

Q. Mr. Scally, was there a difference in the rates quoted to you between a shipment of on-deck cargo and under-deck cargo? A. No.

Q. In this particular instance, referrable now to the locomotives, was it your understanding that GE would be charged a rate commensurate with on-deck cargo?

MR. CONE: I object to the form of that question, because he has already answered there is no difference between an on-deck rate and any other rates.

Q. At any particular time were you quoted a rate for under-deck cargo by Lykes Bros.?

MR. CONE: You are referring to this under-deck cargo here?

MR. KEENAGHAN: Yes, for this under-deck cargo.

THE WITNESS: Can we go off the record?

MR. KEENAGHAN: Yes.

(Discussion off the record)

MR. KEENAGHAN: Let's go back on the record with this.

(15) A. (Continuing) The cargo, generically, that you speak of, consists of three pieces.

One is the superstructure, which is the large cab, and two trucks or bogies.

The bogies, or trucks, they are under-deck.

So, if you will stay away from those, I will answer your question.

The question of under-deck is not germane, nor did it come

up, because the units physically could not be carried under-deck on the Lykes service.

Q. You are referring now to the cabs? A. To the cabs, yes.

Q. The other portion of the shipment, which I think you called bogies— A. Or trucks, yes.

Q. —they were shipped under-deck? A. Yes.

Q. Were they shipped at a different rate than the on-deck cargo? A. No, because this was a lump sum, three parts, three pieces, one rate.

Q. If I may draw your attention to the Bill of Lading, the cargo is described as 3 skids: "electric locomotive." And then the gross weights and measurements are (16) quoted here. And this is repeated three times.

Now, did you have an understanding at the time that this Bill of Lading was executed as to what the term "skids" meant?

MR. CONE: Understanding with whom?

Q. Did you know, sir, of your own personal knowledge, what the term "skids" meant when used in this context here? A. I know what the term skid means. The locomotive is made up of three parts, as I mentioned. All of these are on a skid of some type. They are three skidded pieces.

The cab is skidded, because the bogies are not on it, and it must be supported.

Then the bogies are also skidded.

So they are called three skidded pieces. Probably the word pieces would have been more definitive here.

Q. By th way, the Bill of Lading is printed on a document that bears the heading "Lykes Bros. Steamship Co., Inc., Intermodal Bill of Lading; is that right? A. Yes.

Q. Where did you get the particular document that your company prepared? (17) A. Our Freight Forwarder prepared the document, and I have to assume that this is customary of the steamship company—in this case, Lykes Bros.—that they supplied us with the appropriate form.

Excerpts from Deposition of John Scally

Q. Who is your Freight Forwarder? A. As indicated on the Bill of Lading, J. D. Smith Inter-ocean, Inc.

Q. In addition to the Bill of Lading, have you brought other documents with you that were prepared prior to the shipment of this particular cargo? A. I have some documentation with me, yes.

MR. KEENAGHAN: I would call for the production of those documents that were prepared to the actual shipment of cargo.

MR. CONE: Off the record.

(Discussion off the record)

MR. CONE: Let's go back on the record.

The witness has produced from the GE File of Documents a Shipping Expense Invoice No. 12223, dated April 17, 1978, covering the Ocean Freight and Insurance in the sum of $101,246.53.

In addition, the witness has produced three separate and distinct invoices, each for one locomotive that was transported on the S.S. NANCY LYKES.

EXCERPTS FROM TESTIMONY OF DALE WERNER

(17) * * *

Q. And what are those actual costs? A. The actual costs as shown on page 2 are $1,638,000.

Q. The $1,638,000, does that include ocean freight? A. That does not include ocean freight.

Q. Do you know how much the ocean freight was? A. $71,000.

Q. In connection with the $1,638,000, how does that breakdown according to the last exhibit that you have in front of you? A. Okay.

Excerpts from Testimony of Dale Werner

THE COURT: Excuse me, how much did you say the freight was?

THE WITNESS: $71,000.

THE COURT: Go ahead.

MR. COSTELLO: How much?

MR. CONE: $71,000.

MR. COSTELLO: Even?

MR. CONE: Yes.

A. The direct material content of the two cabs was $666,000. The direct labor of the two locomotives was $93,000. The variable indirect manufacturing (18) expense was $242,000. The base manufacturing expense was $226,000. Engineering expense was $238,000. Administrative expenses were $173,000.

Q. In connection with the replacement of the two locomotive cabs and platforms that we are discussing here, in the expenses involved of $1,638,000, did that figure differ from the original costs incurred by GE for the manufacture of the two locomotive cabs and platforms that were lost over the side of the Nancy Lykes? A. Yes. There was a difference in cost.

Q. Do you have any idea of what the difference was? A. I think the difference was probably 10 percent higher due to the the fact they were built a year later at a higher rate of inflation.

Q. You mean 10 percent higher for the replacement, is that correct? A. Yes.

Q. The reason for that was what? A. Inflation.

Q. In addition to the $1,638,000 costs, am I correct that you had ocean freight charges of $71,000? A. That is correct.

(19)Q. If I were to add those two figures, are they the full amount of actual costs incurred by General Electric for replacement of the two locomotive cabs and platforms in question? A. Yes.

Q. Concerning the original invoice price for these locomotives; in other words, the price for which they were sold to the Taiwan Rail Administration, do you know when the contract

was entered into between GE and the Taiwan Rail Administration? A. The contract was entered in 1974.

Q. In connection with those invoice prices, do you know whether GE agreed to one price for the entire term of the contract? A. Yes, they did.

Q. Do you know whether GE in fact as the contract time went by incurred costs that were over what they had billed the Taiwan Rail Administration? A. The costs were in excess of the amount billed to the Taiwan Railway Association.

* * * * *

EXCERPTS FROM TESTIMONY OF ROBERT A. RAGUSO

(62) * * *

[RAGUSO]

So the first hazard, we will say, or possible pit fall to any coastal track might be the passing through the Gulf of Tehuantepec and whether or not there might be northerly winds entering into that region from the Gulf of Mexico.

MR. COSTELLO: I move to strike the answer, your Honor. It is dealing in possibilities. The answer is purely speculative as to what the ship may or may not have run into.

THE COURT: The objection is overruled because I understand it's quite germane to the case as to whether if the ship did meet such bad weather, the weather was foreseeable or not and the answer of the witness is certainly relevant to that.

MR. CONE: Yes, your Honor, and we are not now dealing with this specific voyage, but just in general.

THE COURT: I understand.

* * * * *

Excerpts from Testimony of Robert A. Raguso

(75) * * *

Q. All right, Mr. Raguso, if Bendix Marine Services had been retained by Lykes Bros. to route the Nancy Lykes on the particular voyage that we are talking about toward the Far East and you were told by Lykes that three locomotive cabs and platforms were on the deck over a hatch cover lashed athwart ships with a total of 60 tons worth of chains on each, how would you have routed that vessel across the Pacific?

MR. COSTELLO: Objection, your Honor.

MR. CONE: That's a valid hypothetical, your Honor. The witness is an expert.

THE COURT: Overruled.

A. With the vessel's specification as you have stated them, it would be our understanding that it (76) would be a safety routing, and to that degree we would have routed him most probably south of Honolulu in order to keep him in—keep the vessel in the favorable easterly trades and avoid completely any risk of adverse weather and adverse ocean current conditions which would be found much to the north, so we would probably have directed him or suggested or recommended to the master that he consider a track just to the south of Honolulu and then to rhumb line toward the approaches of destination Japan.

Q. If in fact the Nancy Lykes had taken the track that you recommended, would it have encountered adverse weather conditions or pit falls? A. No, sir. Favorable conditions for at least three-quarters to almost the entire voyage. There was a frontal passage that had to be expected within a day's arrival of Japan, but favorable conditions, quartering and following winds and seas of force 3 to force 5 for at least four-fifths of the voyage.

Q. In connection with the loss of the locomotive cabs and platforms, did you research the particular weather event that was causative of that loss? A. Yes, sir, I did.

Excerpts from Testimony of Robert A. Raguso

(85) * * *

THE COURT: Excuse me, that is confusing. It sounds to me as if there were more gales than there were hours.

THE WITNESS: No, there are 704 hours of gales as opposed to 6,696 hours in each of the respective Mays, so in a word, you are pretty close to about a 10 percent incidence of gales in this corridor.

THE COURT: Slightly higher.

A. If you reduce your corridor and not discuss any of the orient coast or the more northerly reaches of this corridor, and just look at the California coast, a conservative figure would certainly be a five to six percent incidence of gales in any month of May for the previous ten years.

Q. Am I correct that the problem within the corridor that you testified to, whether at the top of the corridor or at the bottom of the corridor, is still caused by the same basic weather conditions? A. That is right. It is a northerly, so that if it is observed and recorded at latitude 48, if you wait awhile, if you wait a day, or 12 hours or 18 hours, that northerly wind and sea will roll onto the south so that vessels to the south of that position will (86) certainly be encountering that.

THE COURT: I would like to ask you a question. With regard to the question of general awareness of this phenomenon within the maritime profession, in my landlubberly experience, it seems similar to the general knowledge in this part of the world that in the months of late August and September, for example, hurricanes originate in the caribbean. Is that the degree of knowledge of this phenomenon?

THE WITNESS: To a certain degree yes. Other than that, the hurricane is a really major event.

THE COURT: I am not talking about the comparability

of the events; I am talking about the degree of public knowledge of their existence, or not public knowledge, knowledge among the—

THE WITNESS: Similar. Among the mariners, yes.

There are other months of the year where this has even more of regularity.

THE COURT: You had better stick to the ones we are dealing with.

THE WITNESS: Just May.

* * * * *

AFTERNOON SESSION
2:05 p.m.

THE COURT: We had just begun a search of the weather for the other two like [sic] ships that had gone to San Pedro.

Q. Before we broke, I believe I had asked whether you had researched the weather encountered by the two prior like [sic] ships that had entered San Pedro for cheap bunker fuel. When I say prior, I mean prior to the Nancy Lykes going to San Pedro. A. Yes, sir.

Q. What did your research show concerning those two ships which I believe, you have identified as the Dolly Turman and the Brinton Lykes? A. Yes, sir. The Dolly Turman appeared to be outbound from Balboa, Panama Canal, and went to Long Beach, and she arrived on March 22, but in order to get to Long Beach, she had to go up the Central American coast and the Mexican coast and in so doing, according to the weather charts and also an entry in the Mariner's Weather Log, this vessel encountered northerly gales, that is, winds of 45 knots and seas of 14 and a half feet with a 28 foot swell.

THE COURT: The seas were what?

Excerpts from Testimony of Robert A. Raguso

(89)THE WITNESS: Seas were 14 and a half feet and the swell was 28 feet high. On the 18th of March, at 1800 Greenwich Mean Time, in a position at 13.6 north and 94.6 west, and that falls very, very closely within the description we gave this morning about the Gulf of Tehuantepec. In fact, she had encountered the Gulf of Tehuantepec gale.

Q. How were you able to determine the exact wind and sea conditions that the Dolly Turman encountered? A. It was reported by the vessel itself, and was listed in the September, 1978 Mariner's Weather Log, which is volume No. 22, and No. 5 on page 368.

Q. Do you have that Mariner's Weather Log with you? A. I have the original, yes.

MR. CONE: Your Honor, at this point, we could offer the original for identification purposes only.

A. I can make copies of this.

THE COURT: The question is whether this fact is in issue or not.

MR. COSTELLO: Your Honor, it is irrelevant and immaterial, as far as I am concerned.

(90)THE COURT: I don't believe it is. You are free to argue that, but you are not contesting the alleged fact of this weather at this point on this day?

MR. COSTELLO: I don't know. That is his testimony. I have no way of knowing.

THE COURT: Then we might as well—

MR. CONE: Then, your Honor, I will offer the booklet in evidence.

THE COURT: All right. We will mark it now.

THE WITNESS: These are my originals.

Excerpts from Testimony of Robert A. Raguso

THE COURT: I will accept a copy and I am sure Mr. Costello will accept a copy.

MR. COSTELLO: I have no objection to the copy. I have an objection to the exhibit as being irrelevant and immaterial.

MR. CONE: That would be Plaintiff's Exhibit 8, your Honor.

THE COURT: That is what?

MR. CONE: That is the Mariner's Weather Log, volume 22, No. 5 dated September, 1978, and deals with the vessel Dolly Turman.

THE COURT: Right.

MR. COSTELLO: Now that it has been marked, your Honor, may I see it?

(91)MR. CONE: Certainly.

MR. COSTELLO: What page are you referring to?

THE WITNESS: Page 368.

Q. What weather conditions did that vessel encounter and where and when? A. She was outbound from the U.S. Gulf for the far east but went to Long Beach as well. She arrived Long Beach on March 31, 1978, and then she sailed to the far east. And later, on April 11, at 1800 Greenwich Mean Time, the vessel was at latitude 33.2 north and 161.8 east, and she reported winds west northwest 41 knots, and a swell from the west northwest at 21 feet. She was on the northeasterly trade route to Japan from Long Beach.

Q. In connection with the Brinton Lykes, how did you make those determinations? A. The reports of the vessel's weather were offered on page 369.

THE COURT: Of the same exhibit?

THE WITNESS: Of the Mariner's Weather Log, and I believe that was a November 1978 edition, if I can double check this.

No, that would be the same edition in Mr. (92) Costello's hand.

Q. So it would be in the same exhibit that we have marked as Plaintiff's 9, is that correct? A. Yes, sir.

Q. In connection with the Brinton Lykes and the Dolly Turman, would in your opinion, either of those vessels have encountered the weather that they did encounter and which you have testified to had they not been going to San Pedro or Long Beach for bunkers? A. It is my opinion that had the Dolly Turman taken a more direct and customary track toward Japan from Balboa, she would have been further offshore and in the more southerly latitudes, so that she could have avoided passing close by the Gulf of Tehuantepec. As such, she most probably would have had lesser winds and seas. Depends upon how far off the coast that track might have been, but certainly, the second vessel, the Brinton Lykes, would have been further to the south had she gone on a more direct track from Balboa toward Japan, say, by way of Honolulu.

Certainly, she would not have been up at 33 north at 161 east. She could have been at 28 or 29 north latitude, about 240 to possibly 300 miles further to the south than where she actually was had she taken (93) the more direct track by way of Honolulu.

THE COURT: In your opinion, what would have been the effect of being 240, 300 miles south?

THE WITNESS: Certainly easier on the wind. I don't think a 21 foot swell could have been avoided completely. It probably would have been somewhat lower. How much lower, I don't know at this point, but being some 300 or 240 miles further to the south, the swell would have been lower, maybe about 15 feet.

Q. In connection—

Excerpts from Testimony of Robert A. Raguso

MR. COSTELLO: Move to strike out what may be.

THE COURT: You don't mean 15 feet lower, you mean a swell.

THE WITNESS: Well, I mean a swell of 21 feet, but it is hard to say. I must be honest with you.

Q. In connection with the Nancy Lykes itself with the three locomotives lashed athwartships, you stated the vehicle should have been routed the safest possible way which would have been through the Hawaiian Islands or south? A. Could have been through Honolulu or certaintly south if a safety track—

Q. In connection with those southern routes, how far are they from the port of San Pedro? (94) A. I have to measure it. Can I measure up there?

Q. Certainly.

(Pause.)

A. The northernmost track that might be considered for this vessel is at least 600 miles to the south of the San Pedro and Long Beach area.

Q. But my question dealt with the southern tracks.

THE COURT: To Honolulu.

Q. The path that the Nancy Lykes should have taken? A. Fine.

(Pause.)

A. The southermost track is about 1,200 nautical miles south of the San Pedro, Los Angeles, Long Beach area.

Q. Are you using the same longitude when you track the mileage distance? A. Almost. I can do that, and the distance would be no appreciable change, within 50 miles of the previous distances I have given you.

Excerpts from Testimony of Robert A. Raguso

THE COURT: I assume that the Honolulu route is very close to the southernmost one in terms of (95) distance?

THE WITNESS: Yes. It is about 120 miles.

THE COURT: Difference from the southernmost?

THE WITNESS: Yes, sir.

Q. Mr. Raguso, you have testified concerning the expected or the actual, rather, weather conditions that would have been encountered had the Nancy Lykes taken the southern routes. A. Yes, sir.

Q. I would like to know what the weather conditions would have been encountered by the Nancy Lykes had she taken the northernmost route on your chart here, which is Plaintiff's Exhibit 5, in other words, the top red line. A. The top red line.

There is an exhibit that has been prepared, but I don't have it in front of me.

MS. BENZIE: That is 14-A. You have it, your Honor.

THE COURT: I am going to look at it with the witness.

THE WITNESS: That is not the one.

Q. For the record, you are referring to which exhibit now, 14? (96) A. It is Joint 14. There are two large charts. One is called Raguso 9-A. It is labeled "Available track for vessels sailing from Balboa, Panama Canal Zone bound for Japan, April, May, '78".

THE COURT: That shows the weather that you have taken from other sources, I take it?

THE WITNESS: From the weather charts, yes, sir.

A. What was the question, sir?

THE COURT: What was the weather? What would have been the weather have been should she have gone that route?

Excerpts from Testimony of Robert A. Raguso

A. The worst weather that she gets is between the third of May at let's say, 1800 Greenwich time, and the 4th of May at 12 o'clock Greenwich time, and she has northerly winds of force 5 to force 6. So the worst is force 6, both at force 6, and the sea conditions are from the north at two meters in height. That would be about 6 or 7 feet, and the swell is from the north at 3 meters in height. That would be about 10, 10 and a half feet, perhaps.

Q. In connection with the northernmost route that you have just testified to, what is the closest point in mileage on that route to the port of San Pedro? (97) In other words, how far from San Pedro—

THE COURT: We have already done that.

Q. Does that route traverse? A. About 540 nautical miles. About 540 nautical miles.

Q. So 540 nautical miles would have been as close— A. Closest.

Q. As the vessel would have come to San Pedro? A. To San Pedro, yes.

Q. Would that route have placed the vessel outside of the corridor area that you were talking about before, the area of weather problems? A. Yes, sir. It would have been south of this particular corridor by at least 300 miles or so, certainly.

Q. In connection with the Nancy Lykes itself, have you looked at the deck logs? A. I have looked at the deck logs, yes.

Q. Have you ascertained a speed of the vessel? A. Yes. We recalculated all the distances and the times from local noon to local noon, and we averaged the speeds so that we have an idea for her average speed for each of the legs, Galveston to Panama,

* * * * *

(435)Q. All right. And did you calculate a percentage based on the Mariners' Weather Logbook back to 1975? A. Yes, I have.

Excerpts from Testimony of Robert A. Raguso

Q. And where exactly is the area that you are talking about in this percentage, in terms of latitude and longitude? A. As I described earlier, we have since refined that so that we can talk only to the California coast, so we went from about 28 or 29 north latitude to the latitude of 44 or 45 north latitude, and from the immediate coastal region, and there are some indentations here, so we can use a 118 west longitude out to about 138 west longitude, and that would describe the area which defines the California coast and also incorporates a little bit of elbow room, we'll say, for impact to the California coast.

Q. And what was the final percentage figure that you came up with, taking it back to 1975? A. 7 percent.

Q. 7 percent for what? A. 7 percent incidence of gales as a function of time in each month.

(439) * * *

Q. There was some testimony last week, when you testified, that when you went up to measuring these (440) normal winds, whatever we call them, that you found the incidence to be upwards of 10 percent of the time, and yet when we got down to the San Pedro area we spoke about them being 5 to 6 percent of the time? A. That is true.

Q. Now, by using this envelope, let us say, 240 to 300 miles below San Pedro, going back almost somewhere between 480 to 500 miles up to Oregon, in that envelope, you arrive at 7 percent, is that correct? A. 7 percent, yes, sir.

* * * * *

EXCERPTS FROM TESTIMONY OF RICHARD OAKES PATTERSON

(168) * * *

Q. Why would you have protested to the operations department if they ordered you to proceed with the Nancy Lykes to San Pedro? A. Basically, because of the type of deck cargo we carried. As I have mentioned before, I wasn't happy with the way it was secured, and I wouldn't be happy (169) about going

up on a northern route where I would be faced with adverse winds, adverse currents, delayed time for fueling in San Pedro, and the vessel was already about 8 days behind schedule; whereas, if I could take my own choice, leave Panama, head straight out below the Hawaiian Islands and way out over say I would say 150 degrees east longitude, and from then on up to Kobe, I would have nothing but fair winds all along the line and actually, I would be there two days faster than I could do it up by the northern route.

Q. You say that using the route south of Hawaii, you would be there some two days, at least two days quicker than using the route that the vessel actually took, is that correct? A. Yes, sir.

Q. What do you base that upon? A. On the fact that to take her bunkers in San Pedro to begin with, there is a 15 hour time delay roughly, an hour or so one way or the other. After she leaves San Pedro to Kobe, she would be running right into the worst of what we call the Koreshima, the Japanese current, which can be very strong up to 16, even more, knots a day right on the nose. Prevailing winds would be right dead ahead, whereas if we left (170) Panama, went southern of the Hawaiian Islands, we would be right in the ferrous of the trade winds and have as much as 12 to 16 knots a day pushing me along and a fair wind too. I would have the advantage as I got over the westward, of this Japanese current. I could curve up on to the north toward Kobe and carry that with me just to the last 24 or 36 hours before I would get into Japanese island areas.

Q. Hypothetically, if the operations department of Lykes Brothers were to tell you as master of the Nancy Lykes that they would save 20 or $25,000 by going to San Pedro and picking up cheap bunkers, would that savings in any way be offset by the loss of 2 or 2 and a half days in time for the voyage itself?

MR. COSTELLO: Objection, your Honor.

THE COURT: I don't know. I don't know if the objection is based on relevance. Is that what it is?

Excerpts from Testimony of Richard Oakes Patterson

MR. COSTELLO: Yes, your Honor.

THE COURT: I think since in your own brief you argue that to achieve the economy which you did achieve and was an element of reasonableness, it is perfectly appropriate for counsel to try to bring out that the economy was not as great as you hoped it would (171) be.

* * * *

(184)

Q. Captain, what did you say they would have saved if they had taken the southern route? A. I can give you an exact figure.

Q. All right, if you will. A. It would be three days and 14 hours.

Q. How did you arrive at the figure of three days and 14 hours? A. From the logbook of the Nancy Lykes. I took the exact time that they went from Galveston to Panama. That's what they actually performed.

From the departure from Panama on the route that I would have taken myself I calculated the distance up to Kobe. Then from studying the logbook I found out that the average fuel consumption in fair weather is 352 barrels per day, and on the distance and (185) the 17 knots speed plus the effect of fair current and fair wind, I calculated the number of days it would take to get to Kobe from Panama on the Southern route.

EXCERPTS FROM TESTIMONY OF RALPH LACHER

(217)

Q. And why was that decision made early in 1978? A. Well, we found that that particular area at that time had the lowest fuel oil prices we could find.

Q. And after making that decision did there come a time when a vessel from Lykes Bros. on this particular service stopped for bunkers only at San Pedro? A. Yes.

Q. And what vessel was that? A. I believe the first one was the Dolly Turman.

Excerpts From Testimony of Ralph Lacher

Q. I show you that which is called the Master's Voyage Report, Defendants' Exhibit J, previously marked, and would you kindly identify it, please.

MR. COSTELLO: May I show it to the witness, your Honor?

THE COURT: Yes.

MR. COSTELLO: I think your Honor has a copy. They originally had submitted them, but they are here, your Honor. I will be now utilizing the defendants' exhibits.

THE COURT: These are the exhibits?

MR. COSTELLO: Yes, your Honor. These are the defendants' exhibits.

THE COURT: I am sorry, What did you say (218) the title of this is?

MR. COSTELLO: This is the Master's Voyage Report.

THE COURT: All right. You want to show it to the witness?

Q. I show you the Defendants' Exhibit J and ask you do you recognize it. A. Yes, I do.

Q. And what is it? A. It's the Master's Voyage Report that is submitted to the company on completion of the voyage.

Q. And is that prepared by the master of the vessel? A. Yes, it is.

Q. And it's submitted to you, submitted to operations at the completion of each voyage? A. Yes, it is.

Q. And is that a record kept in the ordinary course of Lykes' business? A. Yes.

Q. By your department? A. Yes.

MR. COSTELLO: I offer that in evidence, your Honor.

* * * * *

(223)

Q. I show you Defendants' Exhibit F and Defendants' Ex-

hibit G and will you tell us what they are. A. F is the Brinton Lykes Master's Voyage Report.

THE COURT: Of what date?

THE WITNESS: This shows she arrived in Long Beach on March 31 and also sailed on the same date, and she arrived from, yes, New Orleans, and she sailed to Kobe after that, took on 10,000 barrels of fuel at Long Beach.

Q. And then I gave you another exhibit there, Will you tell us what that is. Withdrawn.

Before I do that, that's also a record similar to the other Master's Voyage Report, correct? A. Yes, it is.

Q. What voyage is this for the Brinton Lykes? A. This is Brinton Lykes voyage 68.

MR. COSTELLO: I offer that in evidence, your Honor.

THE COURT: All right. Received.

A. This Exhibit G—

MR. COSTELLO: Just a moment.

(Defendants' Exhibit F was received in

(240) * * *

Q. If you had heavy deck cargo, would your job as a line supervisor differ in what recommendation you (241) were going to make as to bunkering? A. No.

Q. There'd be no difference? A. No.

Q. In other words, if you had—take the case in question, the Nancy Lykes is leaving the Gulf with these three GE locomotives on its deck, athwartship on a hatch cover that's no more than 25 feet wide and the locomotives are 50 some-odd feet each. First of all, are you aware of how they were lashed? A. No, I wasn't.

Excerpts From Testimony of Ralph Lacher

Q. Are you made aware of how they were lashed by anybody?

THE COURT: As a matter of practice is he made aware, you mean?

MR. CONE: Right.

THE WITNESS: No.

Q. So you are not aware of how they are lashed, is that correct? A. No.

Q. Are you aware of how they are stowed, fore, aft, or athwartship? A. Yes.

(242)

Q. How are you made aware of that? A. By, you know, receiving the stowage and passing it on to the other ports, we would know it.

THE COURT: The same way as you are made aware of other stowage, right?

THE WITNESS: Yes.

Q. Are you aware of whether the locomotives were chocked? A. No.

Q. Are you aware of any possible carpentry work that might have been done in securing the locomotives? A. No, because that's actually done through the stevedores, and you know, ship's officers, what lashing and chocking they should do on a ship.

Q. So basically what you are aware of is that, with the Nancy Lykes anyway, that you had three locomotives on deck stowed athwartships; is that correct? A. Correct.

Q. And of course you are aware of any other deck cargo; is that correct? A. Yes.

Q. And you then at some point in time made a decision to send the vessel to San Pedro for cheap (243) bunker fuel; is that correct? A. Yes.

Excerpts From Testimony of Ralph Lacher

Q. Was that decision made prior to your having been aware that it had three locomotives athwartship on its deck? A. I don't know.

Q. Do you have any notes or anything that would indicate when you made this decision? A. No.

Q. Did you yourself make the decision, or did you make it in connection with your supervisor, Mr. Bulloch? A. We made it in connection with my supervisor.

Q. Do you know or do you recall what prompted you to make this decision to go to San Pedro? A. For the cost savings of the fuel involved.

Q. Who advised you that there were savings in bunker fuel at San Pedro? A. We keep track of all the fuel prices from the major oil companies, what the prices are at any given time.

* * * *

(246)

Q. So what about these other ports that you stopped at for bunker fuel? Could they possibly have been advertised by Central Gulf? A. Possibly.

Q. San Pedro was not advertised by Lykes on that particular outbound voyage that we are talking about, correct? A. Correct.

Q. Why? A. Because I think it's a normal practice just to advertise your ports of loading and discharge.

Q. You mean cargo ports, is that it? A. Cargo ports, yes.

Q. What other ports did Lykes have aside from the port of San Pedro that it stopped at in 1978 to acquire cheap bunker fuel, that were not cargo ports? A. That's the only one I can recall.

Q. It's the only port? A. Yes.

Q. What ports did you have before 1978 that you (247) stopped at to acquire cheap bunker fuel that were not cargo ports of call? A. I don't know of any.

Q. You don't know of any? A. No.

Excerpts From Testimony of Ralph Lacher

Q. So how do you come up with the custom that it was customary not to advertise San Pedro? What do you base that on?

MR. COSTELLO: Objection, your Honor.

Q. That statement that it was customary.

MR. COSTELLO: Objection, your Honor.
THE COURT: Overruled.
MR. CONE: Your Honor, it's relevant.
THE COURT: I said overruled.
MR. CONE: Thank you.

A. I just think it's—I don't know why—I don't see any reason why somebody would advertise a bunker port.
Q. What about cargo interests?

THE COURT: Let me ask you, does Lykes now in the light of this suit advertise bunker calls?
THE WITNESS: I don't think so. I don't know.

Q. Do you have any ports today—
(248)

THE COURT: What can you lose by doing so? Are you afraid you will scare off business?
THE WITNESS: I don't know if they—I don't get involved in the—I don't get involved in the advertising end of it; but I don't see why they shouldn't.
THE COURT: Maybe I shouldn't ask you.

Q. Your answer was you don't see why they shouldn't advertise? Is that what you just said? A. Yes.
Q. We have had—have you been here through the trial up to date here? A. Just today.
Q. Just today? A. Yes.

Excerpts From Testimony of Ralph Lacher

Q. We have had testimony to the effect that one of the important considerations for a liner service is to try to maintain their schedule or stay as closely as possible to their advertised schedule. Would you agree with that? A. Yes.

Q. Were you aware that the vessel could have saved time, the Nancy Lykes, if it had taken the southern broken line route south of Honolulu? I am (249) referring to plaintiff's exhibit 5.

MR. COSTELLO: I will object to this line of questioning, your Honor. This is not proper cross examination. This was not gone into during the direct examination.

MR. CONE: Your Honor, it goes to the thought processes.

THE COURT: He can make the witness his own for this purpose, but I think all you need was the admission, if you want to call it an admission, agreement that—

Q. I would just like to know what went into your mind, what considerations you took when you decided to make San Pedro a bunker stop for the Nancy Lykes.

THE COURT: If you want to ask whether—

Q. Were you aware that you could have shortened the voyage time-wise by taking a route south of Hawaii? Were you aware of that?

MR. COSTELLO: Objection, your Honor.

THE COURT: Overruled.

A. No, because I wasn't aware of any weather involved, any predicted weather.

Q. Were you aware or was anybody working with (250) you aware, anybody who made this decision, was involved in this decision to send the Nancy Lykes to San Pedro, were any

of you aware that you could have saved time by taking a southerly route, the route south of—

THE COURT: He can't testify what other people were aware of unless they told him they were aware of it.

MR. CONE: I am talking from his experience, your Honor, in working with these people.

MR. COSTELLO: Objection, your Honor.

Q. Were you aware? You weren't aware; is that correct? A. No.

Q. Were you aware of weather problems on possible routes that you selected, potential weather problems? A. I guess any route has potential weather problems.

THE COURT: Were you aware of a phenomenon that has been testified to here as a chinook winds or—

Q. Santa Ana wind off the California coast?

THE COURT: Coming through the area of San Pedro with a certain degree of regularity?

THE WITNESS: No, I wasn't.

(251)Q. Just as a point of curiosity, why didn't you have all your ships outbound from the Gulf in early part of 1978 stop at San Pedro on the way to the Far East? Why just three ships? A. It probably was the prices at the time.

Q. Wasn't it a fact that San Pedro became cheap in January of 1978? A. I don't know. I don't have my records here right now.

Q. How many ships did you have leave the Gulf for the Far East between January and May of 1978? A. I don't know.

Q. Could you give us a ball park figure? Would it be ten ships? A. Between January and May?

Q. Yes. A. I think we used to run maybe—

Excerpts From Testimony of Ralph Lacher

THE COURT: Again, Mr. Cone, I don't know what further you are trying to prove. The witness—

MR. CONE: I am just trying to prove, your Honor, that it was not something that they were doing with any degree of regularity at that time at all, and the only reason I am going into that, and I want to go into subsequent periods of time, is because, your Honor, * * *

* * * * *

(254)Q. And you have also stated that San Pedro was the only port of call other than the regularly scheduled port where you went out of your way to get cheap bunker fuel; is that correct? A. Yes.

Q. Why didn't you go to other ports? I mean Montreal right now is considered the cheapest bunker fuel port in the world.

MR. COSTELLO: Objection, your Honor.

Q. Why wouldn't you go to other ports other than San Pedro?

MR. COSTELLO: Objection.

THE COURT: I will sustain the objection. It seems to me we are just belaboring an issue here. Your major point is that they went out of their way to save money, and the defendant said, "Yes, I did." I don't know what more one can prove. This was a decision based on your desire to save money, wasn't it?

THE WITNESS: Yes.

MR. CONE: Your Honor, I have no further questions.

* * * * *

EXCERPTS FROM TESTIMONY OF WILLIAM KACIAK

(270)Q. Now, particularly going back to the Nancy Lykes, did there come a time when you received a request to suggest a weather routing for this vessel from San Pedro to Kobe, Japan? A. We received a request from the master for weather routing I think it was around two days before he was scheduled to sail.

THE COURT: This is trip 63 we are talking about?
MR. COSTELLO: Trip 63, yes.

A. I think it was approximately two days before that he requested weather routing from us, that we provide it, gave us his estimated time of departure from San Pedro.

THE COURT: Excuse me. Two days before he was to sail from where, Galveston?
THE WITNESS: No, from San Pedro.

Q. There was no request to weather route him through the Gulf or from the Gulf up to San Pedro, was there? A. There was no request there.

Q. Is that unusual? A. No, that's not unusual. The only time we get requests to route them from the Gulf to Panama and

* * * * *

(273) * * *

Q. There was reference to the Dolly Turman, I believe, in March 17, 1978, of experiencing the Tehuantepec winds or off the Gulf of Tehuantepec on March 17.

(274)Now, does one find in March that you can expect them? A. Well, in March, according to the book of climatology—would you like the reference?

THE COURT: Yes.

A. I used the Climatological and Oceanographic Atlas, and it was compiled by the United States Weather Bureau and by the

United States Hydrographic Office. So this is an atlas prepared by them.

In that particular atlas they do have measurements right in the Gulf of Tehuantepec and they give the frequency of occurrences of different wind intensities, and from that particular table I found that in March there is a 4 percent chance of having a Tehuantepecer of force equal to or greater than force 7, there is a 1 percent chance—

THE COURT: Force 7 is gale?

THE WITNESS: Not quite. It's near gale. So it's a lower limit. Gales start at 34 knots. It's force 8, usually, gale.

THE COURT: All right.

A. So force 7, there is a 4 percent chance of a force 7 or greater wind in March, force 8 or greater, which is gale, there is only a 1 percent probability.

* * * * *

(303) * * *

THE COURT: May I ask you a sea [sic] sequential: Bearing in mind the circumstances which existed at the time that this trip actually occurred, would you have recommended a route that—I guess you did recommend a route that was outside this so-called envelope?

THE WITNESS: No, no I have him from San Pedro. I had nothing to do with lower California.

THE COURT: Would you have a recommended a route like that?

(304)THE WITNESS: The odds are I definitely would have been well north of—I would not have selected any of these southern routes. I would have rejected those.

Q. Why? A. In our initial forcast we had predicted there would be storms in this area.

Q. What area is that we are talking about? A. Just a little

bit north of Hawaii. They are called Kona lows. Subtropical lows were forming in that particular area. With the very strong high north of Japan the worst weather would have existed, if that type of system we are assisted, the worst weather would have persisted in the more southerly latitudes. You would have had the greatest swells and rolling. The odds are it could have been very close to this northern envelope or possibly—it could have—I think that I might have recommended it might have been close to this northern envelope. We would have kept him south of the northerlies initially and then brought him up north very similarly to what we routed the vessel in the latter part of the crossing.

* * * * *

(321) * * *

Q. You said that you recommended that the (322) vessel or you thought to yourself I can't recommend the vessel goes south because of the rolling problem; is that correct? A. In my original forecast I had the bad weather shifting south, so if I sent them south, it would be in the weather longer. I think the quickest way out of the area and to minimize the exposure to weather was on the northerly route. That is the reason why we sent them northerly. The southerly was rejected not just because of the rolling. That was one of the major considerations but also that the weather would be worse there for a longer period of time.

Q. You have testified that if you were routing this ship you'd route it some place inside this red marked envelope on Plaintiff's Exhibit 35. If you had been asked to route it from the Panama Canal Zone. A. Not quite. I said I might come very close to the northern envelope and might not be inside, might be very close to it probably.

Q. And you also said before that taking this northern route would avoid the northerlies. A. That particular one—

Q. What did you mean by the northerlies? A. I meant this coastal. By being—I think I (323) modified that on the en-

velope. I said I might have them further south in the easterly part of the pacific to avoid the northerlies. Northerlies I mean the stuff that was happening off the California coast and these swells had traveled quite far south, so it would have been necessary to possibly be further south in this area can't of the in the easterly part of the ocean.

Q. What creates or what causes the northerlies? A. It's basically a gradient between a high pressure still off the Pacific coast and low pressure inland, and so there is a gradient between the two, the flow around a high.

Q. Clockwise? A. The flow about a high is clockwise, about a low counterclockwise, and the combination of the two, it's the differential and pressure between a high pressure and a low pressure creates a new gradient.

Q. Isn't it a fact that in the springtime months lows form with great frequency? Isn't that a fact? A. It's nearly permanent, yes, with great frequency, yes.

* * * * *